No. 95-808

Supreme Court, U.S.
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Supreme Court of the United States

October Term, 1995

SOUTHEASTERN EXPRESS CO., ET AL.,

vs. *Petitioners,*

TRIAD SYSTEMS CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* of National Electronics Service Dealers Association (NESDA), National Independent Appliance Servicers (NIAS), and International Society of Certified Electronics Association (ISCET); and the Arizona State Electronics Association (ASEA), Chesapeake Electronics Association (CEA), Electronics Technicians Guild of Massachusetts (ETG-MA), Florida Electronics Service Association (FESA), Kansas Electronics Association (KEA), Missouri Electronics Services Dealers Association (MESDA), Nebraska Electronics Services Association (NESA), NESDA of New York State (NESDA-NY), NESDA of Ohio (NESDA-OH), Oregon Professional Electronics Association (OPEA), Professional Servicers Organization of California (PSOC), The Electronics Service Association of Connecticut (TELSA), Tennessee Electronics Service Dealers Association (TESDA), Texas Electronics Association (T-E-A); Virginia Professional Electronics Association (VPEA), and Wisconsin Electronics Sales/Service Association (WESA) IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

I. INTEREST OF *AMICUS CURIAE* 1

II. ARGUMENT 5

A. The Ninth Circuit's misinterpretation of copyright law will prevent independent service companies from competing with manufacturers and should be reviewed on that basis 5

B. The *Triad* decision is contrary to this Court's decision in *Kodak*, and thus undermines the entire service industry 6

III. CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992) 6

MAI Systems Corporation v. Peak Computers, 991 F.2d 511 (9th Cir. 1993), *cert. dismissed*, 114 S. Ct. 671 (1994) 5, 6, 7, 8

Triad Systems Corporation v. Southeastern Express Co., et al., 64 F.3d 1330 (9th Cir. 1995) ..... *passim*

I. INTEREST OF *AMICI CURIAE*[1]

The National Electronics Service Dealers Association ("NESDA") is a trade association for the professionals in the business of servicing all types of electronic products, including consumer products, home/office copiers and business electronic devices, and medical and industrial electronic equipment. The consumer products its members service include appliances, audio systems, computers, radios, telephones, satellite receivers, televisions, and all types of video equipment. The organization from which NESDA grew was founded in 1950.

NESDA's current membership consists of owners and managers of 840 independent service businesses that subscribe to a strict code of business ethics. The members range from one-man shops to large, multi-location service centers. NESDA's purposes are to foster improved service to consumers and to improve its members' businesses through education, information-sharing and cooperation.

The International Society of Certified Electronics Technicians ("ISCET"), which was founded in 1970, is also part of NESDA. There are more than 1900 members of ISCET, which brings the combined membership of the two organizations to more than 2700.

ISCET members are employed technicians, smaller business owners or managers, and electronics instructors. They service a full spectrum of products and devices, including computers, home-entertainment units and

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[1] Counsel of record have consented to the filing of this *amicus* brief, and letters to that effect have been filed with the Clerk pursuant to Supreme Court Rule 37.

industrial, medical and military devices. ISCET members service appliances, radios, phonographs, tape recorders, compact disc players, audio high-fidelity equipment, televisions, audio-visual units, antennae, 2-way communications radios, public address and background sound systems, computers and peripheral equipment, among other electronic products. ISCET's purpose is to further professionalism in servicing and to improve the status of electronics technicians.

Another division of NESDA is the National Independent Appliance Servicers ("NIAS"). NIAS represents dealers and technicians in the appliance industry.

NESDA has individual members in virtually every state, plus other countries. It has associate organizations in sixteen states: Arizona, California, Connecticut, Florida, Kansas, Maryland, Massachusetts, Missouri, Nebraska, New York, Ohio, Oregon, Tennessee, Texas, Virginia and Wisconsin. Additionally, it has cooperative agreements with associations in Colorado, Georgia, Illinois, Iowa, Louisiana, Michigan, Minnesota, North Carolina, Rhode Island, Texas and Washington. These organizations include thousands of other state and local association members. Each local or regional associate organization works independently to serve the consumers and the members in its own area. The affiliated and cooperating organizations combine with NESDA to represent the service industry and provide member benefits on a national scale.

Several of NESDA's affiliated organizations also join in this brief *amicus curiae*:

(1) Arizona State Electronics Association (ASEA);

(2) Chesapeake Electronics Association (CEA);

(3) Electronic Technicians Guild of Massachusetts (ETG-MA);

(4) Florida Electronics Sales & Service Association (FESA);

(5) Kansas Electronics Association (KEA);

(6) Missouri Electronics Service Dealers Association (MESDA);

(7) Nebraska Electronics Service Association (NESA);

(8) NESDA of New York State (NESDA-NY);

(9) NESDA of Ohio (NESDA-OH);

(10) Oregon Professional Electronics Association (OPEA);

(11) Professional Servicers Organization of California (PSOC);

(12) The Electronics Service Association of Connecticut (TELSA-CT);

(13) Tennessee Electronics Service Dealers Association (TESDA);

(14) Texas Electronics Association (T-E-A);

(15) Virginia Professional Electronics Association (V.P.E.A.); and

(16) Wisconsin Electronic Sales/Service Association (WESA).

Becoming an independent service dealer or professional electronics technician requires a substantial investment in tools, work benches, service literature, test equipment, service aids, vehicles, insurance, licenses and other costly items. It also requires constant re-training in new management methods and the application of new technology.

NESDA, ISCET and NIAS enjoy competing as professional servicers and business entrepreneurs for the repair of consumer products. They believe in a free and open marketplace where the consumer can make an informed choice with whom to do business. Given such a choice, the consumer will usually choose the service company that offers the most competence at the best value, whether it is the least or the most expensive. But these ISOs are concerned when one company is, or a group of companies are able to dictate consumers' choices.

The members of NESDA, ISCET and NIAS, as well as all the associate organizations, would be severely impacted by the Ninth Circuit's decision in *Triad Systems Corporation v. Southeastern Express Co. et al.*, 64 F.3d 1330 (9th Cir. 1995), if it is allowed to stand. Service technicians generally must turn on high-technology equipment in order to repair it properly. If Triad is permitted to prevent ISOs from using computer software, the likelihood is very great that other manufacturers will follow suit. Access to the software that runs computers and other high-technology equipment is critical to an organization that services that equipment.

II. ARGUMENT

A. The Ninth Circuit's misinterpretation of copyright law will prevent independent service companies from competing with manufacturers.

Since many of NESDA's members are in the computer software business, the association sympathizes with any company that wishes to recoup a profit from its investment in developing those programs. The association and its members do not believe that anyone has the right to proliferate copies and distribute those copies without compensating the author. However, the Ninth Circuit's ruling in *Triad*, which adopted the holding from *MAI Systems Corporation v. Peak Computers*, 991 F.2d 511 (9th Cir. 1993), *cert. dismissed*, 114 S. Ct. 671 (1994), went well beyond what copyright owners are entitled to under settled copyright law.

Both *MAI* and *Triad* held that turning on a computer constitutes making a "copy" of a computer program. This defies both logic and common sense. When an ISO goes to a customer site to repair a computer, the software on the machine must be activated just as an auto mechanic must turn on a car during the course of a repair. No lasting copies of the software are made, and the same number of copies is at the customer's site when the ISO leaves as when he arrived to fix the customer's machine. This is not extraordinarily complex; indeed it is shocking that such simple-minded arguments must be made at the level of the United States Supreme Court.

NESDA and its associated organizations believe that manufacturers and software developers are entitled to

create separate diagnostic software on disk or tape that is proprietary. However, manufacturers should not be entitled, as they are under *Triad* and *MAI*, to prevent ISOs from competing with them by bundling operating system software with utilities and other diagnostic software.

If left intact, the Ninth Circuit's rulings in *MAI* and *Triad* will create a nightmare for consumers and will seriously damage if not destroy the independent service industry as we know it. Under the Ninth Circuit's rulings, even the profession of servicing television sets, VCRs, vehicle electronics, audio components and other products will be at risk, since these contain computer chips that are activated when the machines are turned on. More and more manufacturers will be encouraged to place software in their units and provide a display that makes a "copy" whenever it is turned on. As a result, more and more consumers will find themselves captives to those manufacturers for repair and maintenance. Such actions would strip the consuming public of its present option to receive better service at a lower cost from independent servicers, an industry that has served this country well.

B. The *Triad* decision is contrary to this Court's decision in *Kodak*, and thus undermines the entire service industry.

In *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 462 n.6 (1992), this Court recognized the "magnitude of the service business." The Court stated that "the development of the entire high-technology service industry is evidence of the efficiency of a separate

market for service." *Id.* at 462. This "efficient" market that the Court recognized is in danger of extinction because of the Ninth Circuit's *Triad* and *MAI* opinions. Under those rulings, ISOs will no longer be able to turn on a customer's hardware in order to service that hardware. The result will be that manufacturers will have no competition whatsoever for service, which will drive up prices consumers pay for service.

As the Ninth Circuit interprets the law, independent servicers will not be allowed even to turn on a computer, nor will a friend of the computer owner who would like to borrow the computer. Such a situation seriously deprives the consumer of logical choices and makes them a captive of the manufacturer who wishes to gain a monopoly on the service of its products. This result will completely undermine this Court's opinion in the *Kodak* case and thus should be reviewed.

III. CONCLUSION

If this Court does not review the *Triad* decision, the tactics Triad used of bundling all software into one package will likely be implemented by many, if not all, manufacturers. This Court should reaffirm its previous decision in *Kodak* that ISOs do, indeed, serve a valuable public benefit.

Respectfully submitted,

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